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No. 82-82

IN THE

Supreme Court of the United States

MICHAEL and JOYCE McKEE,

Petitioners,

vs.

THE COUNTY OF RAMSEY and its DEPARTMENT OF TAXATION, and the STATE OF MINNESOTA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the collection of ad valorem property taxes which are used to fund all county programs and a portion of which are used to pay for contraception devices, abortions or sterilization either infringe petitioners' right to free exercise of their religion or establish a religion in violation of the First Amendment to the United States Constitution.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners are owners of a homestead in Ramsey County, Minnesota against which real property taxes have been assessed and are due. Amended Complaint paras. II & III. Appendix at 8.[1] Petitioners brought this declaratory judgment and injunction action against the County of Ramsey, its Department of Taxation and the State of Minnesota (hereinafter Respondents) in Ramsey County District Court. Petitioners alleged that their real property taxes were being used to promote abortion, contraception and sterilization all of which practices are contrary to petitioners' religious beliefs. Id. at paras. V-VIII. Accordingly, petitioners claimed that payment of such taxes violated their right to the free exercise of their religion and alternatively, that such payments constitute the establishment of religion in violation of the First Amendment to the United States Constitution.[2]

Respondents moved to dismiss the complaint which motion was granted on August 12, 1981. Memorandum Order of Trial Judge, A. at 2. Petitioner appealed to the Minnesota Supreme Court which affirmed the district court in a per curiam opinion. *McKee v. Ramsey County*, 316 N.W. 555 (Minn. 1982). A petition for rehearing was denied on April 12, 1982.

Since this case arises on a motion to dismiss, all the well pled facts stated in the amended complaint are before the Court.

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[1] All references are to the Petitioners' Appendix which will be cited hereafter as A. at —.

[2] Petitioners also claimed that the payments violated the religion provisions stated in Minn. Const. Art. I sec. 16. Complaint, para. VIII. While petitioners apparently continue to press this argument, since it is an interpretation of the Minnesota Constitution, it is not properly before this Court. Petition for Writ of Certiorari at 29.

A. at 7-11. In addition, all of the programs attacked by petitioners are established by statute or rule. Accordingly, the Court may consider, as a matter of law, the structure and restrictions which apply to these programs.

The ad valorem property taxes at issue are those generally levied against all real estate to raise revenue to support the functions of local government. See Minn. Stat. chs. 273-275. The property tax payments of all property owners are commingled in the general fund of the taxing district and spent based upon a preadopted budget. Memorandum Order of Trial Judge. A. at 5.[3]

Petitioners complaint is that a portion of these ad valorem property taxes are used to pay for abortions, sterilization and contraception. These payments are made in accordance with State and federal law in the context of welfare and health programs. Complaint, para. IV, A. at 8. Petitioners have *not* complained that payments have been made outside of those authorized by law, but that the very payments authorized by law violate the U.S. Constitution.

With respect to the public funding of abortions, Minnesota law is very restrictive and allows public funding in essentially the same circumstances as the federal law.[4] State law pertaining to the medical assistance program very clearly pro-

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[3] In Minnesota, property taxes are levied by local governments, *e.g.* school district, municipality, township, collected by county government and then distributed to the local governments in accordance with their levy. Minn. Stat. ch. 275 (1980). Special property taxes are *not* levied to pay for the specific functions identified by petitioners.

[4] Petitioners have tried to characterize the funds which are used to pay for abortions as going for "elective" abortions. However, petitioners made it clear in argument before the district court that they consider funding of abortions for rape and incest victims as "elective" abortions even though public funding of these abortions is authorized by law.

hibits payment for abortion services unless (1) the abortion is a medical necessity, (2) the pregnancy is the result of criminal sexual conduct, or (3) the pregnancy is the result of incest. Minn. Stat. §§ 256B.02, Subd. 8(13), 256B.40 and 261.28 (1980 and Supp. 1981). With some language differences, these state authorized payments are essentially the same as those which would be authorized under the corresponding federal scheme. See 42 C.F.R. § 441.200 *et seq.* (1981). Under the family planning programs available in Ramsey County, no abortions may be funded by virtue of state law. Minn. Stat. § 145.925 (1980).

Sterilization services are provided through the medical assistance program and other Ramsey County programs, subject to the regulations of the Department of Health and Human Services contained in 42 C.F.R. § 50.201, *et seq.*, and 42 C.F.R. § 441.250, *et seq.* Those regulations require that, in addition to qualifying for medical assistance, any person seeking payment for an operation resulting in sterilization must be at least 21 years old, mentally competent, and have given informed consent. *Id.*

Public funding for contraceptive devices is provided through both the medical assistance program and family planning programs. With respect to the medical assistance program, such devices are provided by federal regulation under the pharmacy and medical supply provisions and by statute in Minnesota. 42 C.F.R. §§ 441.20; 441.25 (1981) and Minn. Stat. § 256B.02, subd. 8 (Supp. 1981). Under the family planning programs, contraceptive devices are made available along with counseling programs. Minn. Stat. § 145.912, subd. 9 (1980).

The applicable laws and regulations thus provide standards for public expenditures in support of the abortion, contracep-

tion and sterilization practices petitioners object to on religious grounds. Petitioners did not allege below, nor did the governments ever admit, that any payments were made in violation of these laws. Petitioners' Writ is replete, however, with various direct and indirect charges that the state or county has made payments in violation of these laws and regulations. Petitioners may not now allege that which they have neither proven not pled. This Court should ignore any reference or implication that the county or state have acted contrary to law or regulation.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION OF THE MINNESOTA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER STATE COURT OF LAST RESORT OR A DECISION OF A FEDERAL COURT OF APPEALS AND THE DECISION IS PATENTLY CORRECT ON THE FACTS OF THIS CASE.

A. Introduction

In this case petitioners challenge the collection of property taxes which are in part used to pay for abortions, sterilizations and contraception which are provided as part of State and local medical assistance and family planning programs. While petitioners have attempted to broaden their challenge before this court, the claims which were litigated below and are fairly raised by their amended complaint are their allegations that the payment of real property taxes violates the free exercise clause or in the alternative establishes a religion in violation of the First Amendment. Both claims were rejected by the Minnesota Supreme Court and should similarly be rejected by this Court through denial of a writ of certiorari.

Petitioners have failed to show any conflict between the decision of the Minnesota Supreme Court and any decision of another state court of last resort or a federal court of appeals. In fact, petitioners have failed to show a conflict between the decision in this case and any other decision. To the contrary, as set forth more fully *infra*, the decision in this case is in accord with a line of federal cases which denied religion clause challenges to a series of persons protesting payment of taxes to support military expenditures. *Lull v. Commis-*

sioner of Internal Revenue, 601 F.2d 1166 (4th Cir. 1979); *Graves v. Commissioner of Internal Revenue*, 579 F.2d 392 (6th Cir. 1978); *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970). Indeed, in one of those cases, *Autenrieth*, certiorari has already been denied.

Moreover, the decision of the Minnesota Supreme Court is plainly a correct application of the principles of the religion clauses to the facts of this case. The propositions presented by petitioners are so clearly unmeritorious that they fail to present an important question of federal law which merits further consideration by this Court.

B. The Collection of a General Property Tax Does Not Infringe Petitioners' Right to Free Exercise of Their Religion.

The law is well-settled that a taxpayer may not withhold taxes solely on the grounds that some purpose to which tax monies are put is contrary to his religious beliefs. The Minnesota Supreme Court recognized this principle as a necessity for government to function in a pluralistic society which is comprised of numerous religions with widely varying tenets.

This rule of law is most clearly stated in the line of cases arising out of taxpayer dissatisfaction with United States military involvement in Vietnam. For example, in *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970), plaintiffs sought return of the portion of their income taxes which supported war on grounds that war was contrary to their religious beliefs. The court held that nothing in the Constitution prohibited Congress from levying a tax upon all persons, regardless of religion, for support of the general government. *Id.*, at 588. The court further noted that the income tax is neutral on religious matters, and does not punish

anyone for entertaining or professing religious beliefs or disbeliefs. *Id.*, at 588.

In *United States v. Haworth*, 386 F.Supp. 1099 (S.D.N.Y. 1974), a federal district court found that defendant, a member of the Quaker religion, was not excused on first amendment grounds from income tax liability due to his religious opposition to all wars. In another case involving Quakers, the Sixth Circuit held that compelling petitioners to pay taxes to support American military involvement in Vietnam did not violate the Free Exercise Clause of the First Amendment. *Graves v. Commissioner of Internal Revenue*, 579 F.2d 392 (6th Cir. 1978). *Accord, Lull v. Commissioner of Internal Revenue*, 602 F.2d 1166 (4th Cir. 1979).

This case is indistinguishable from that line of federal cases. Just as the federal government has the power to levy an income tax for the general support of the federal government, so local government has the power to levy a property tax for the general support of local government. Like the income tax, a property tax is neutral on religious matters and does not place an unreasonable burden on the free exercise of anyone's religious beliefs. The fact that petitioners' home is subject to foreclosure proceedings if they continue to refuse to pay their property taxes is no more harsh a penalty than the criminal and civil penalties for non-payment of income tax.

The numerous free exercise cases cited by petitioners are not applicable to this case. In all of those cases, the laws challenged had some relationship to a religious practice or belief and exerted some coercive effect on that practice or belief. Such a coercive effect on the practice of religion must be shown to establish a violation of the free exercise clause. *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 222-223 (1963). In *Schempp*, this Court held that public

schools could not require daily Bible and prayer reading because of the coercive effect on some students' religious practices. *Id.* Similarly, this Court found that a Sabbatarian who refused to work on Saturdays due to her religious beliefs could not be denied unemployment benefits. *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), convictions of Amish parents for violating a compulsory school attendance law were overturned because the Amish religion forbad instruction in many of the subjects the schools required.

In this case, there is no such relationship or coercive effect on petitioners' practice of religion. Petitioners are not being asked to distribute contraceptives, perform abortion or sterilization operations, or counsel welfare recipients on family planning matters. Petitioners are simply required to pay property taxes as must other owners of real property. The property tax does not prohibit or tax any particular religious practice, but rather, collects funds for the general operation of local government.

Finally, the general purpose and nature of the property tax compel the Court to contemplate the consequences of finding in favor of appellants on the free exercise issue. As stated by the Ninth Circuit:

> If every citizen could refuse to pay all or part of his taxes because he disapproved of the government's use of the money, on religious grounds, the ability of the government to function could be impaired or even destroyed.

Autenrieth v. Cullen, *supra*, at 588-589. To grant petitioners a cause of action here would be to open the door to a flood of litigation by other persons wishing to avoid payment of all or a portion of their property taxes because the money might

be used for a purpose contrary to their religious beliefs. Under petitioners' construction of the free exercise clause, such litigants would only have to establish a sincerely held religious opposition to a particular use of tax money in order to be excused from payment of taxes. This is not the law under the applicable precedents and should not be the law.

C. The Collection of a General Property Tax Does Not Violate the Establishment Clause.

Petitioners also argue that the collection of a general property tax, a portion of which may be used to promote abortion, contraception and sterilization, violates the establishment clause of the United States Constitution. While petitioners did not specify any particular religion in the proceedings below, they now claim that "secular humanism" is established by the collection of the property tax. Petition at 9-12.

A statute will not violate the establishment clause if the following principles are observed:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither enhances nor inhibits religion . . . Finally, the statute must not foster an excessive government entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Under these principles, the laws requiring property owners to pay property taxes clearly do not establish a religion. The property tax has a secular legislative purpose, i.e., to support local government. The tax does not enhance or inhibit any particular religion or religious practice. It has no nexus with any particular religion, and therefore does not foster any government entanglement with religion whatsoever.

Petitioners focus their argument on the neutrality requirements of the establishment clause arguing that the existence of a property tax which in small part is used to fund abortion, sterilization and contraception somehow fosters the tenets of secular humanism. However, the property tax is plainly neutral on its face and its primary effect is to raise funds for all programs authorized by law. Its principal effect is not to enhance or inhibit any religion.

In fact, it is difficult to see how the structure and effect of the government programs in question either coincides with or fosters the tenets of secular humanism as characterized in the Petition. Petition at 11. If, as petitioners allege, secular humanists believe that abortion is a right, then the substantial restrictions on public funding of abortion would not coincide with that belief. *Id.* Similarly, the restrictions on sterilization and contraception would not seem to coincide with humanist principles as characterized by petitioners. If anything, these restrictions more closely coincide with petitioners' Catholic beliefs than the tenets of secular humanism.

More importantly, the property tax and the programs at issue are distinctly unlike the precedents cited by petitioners. Petition at 11. For example, *McCollum v. Board of Education*, 333 U.S. 203 (1948) involved releasing children from school for the sole purpose of religious education thus directly enhancing religion. Similarly, in *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Arkansas anti-evolution statute directly promoted one form of religion over others by embodying a religious belief in statute. Finally, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), financial aid programs for non-public schools had the effect of promoting funding religious education.

In the present case any effect on religion which may exist is incidental and serendipitous. It cannot be creditably argued

that the primary or principal effect of the property tax statutes is to advance a particular set of religious beliefs.

To the extent there is any concurrence between the effects of the property tax collection system, and any particular religion, this case is controlled by *Harris v. McRae*, —— U.S. ——, 100 S.Ct. 2671 (1980). In that case, this Court considered an establishment clause challenge to the Hyde Amendment, which restricted funding for abortion in a manner which coincided with the tenets of the Roman Catholic faith. The court held that no establishment clause violation existed, noting that a violation is not shown merely because a statute happens to coincide with the tenets of some or all religions. 100 S.Ct. 2689. The Hyde Amendment, the Court further noted, is as much a reflection of "traditionalist" value toward abortion as it is an embodiment of any particular religion. *Id.*

Under *Harris v. McRae*, petitioners must show more than some very loose consistency between the principles of secular humanism and some portions of the programs about which they are complaining. Certainly, there is no embodiment of a religious principle in law such as in *Epperson v. Arkansas*. Any relationship that is present in this case is coincidental and of no significance for establishment clause purposes.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be denied.

Dated: July 30, 1982.

Respectfully submitted,

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